

05-758 DEC 2 - 2005

No.

OFFICE OF THE CLERK

In The
Supreme Court of the United States

KATHLEEN J. GREENE,

Petitioner,

v.

CITY OF WALLA WALLA,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Washington**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Washington statute violates federal due process by deeming a person on a first DUI conviction a prior offender, and, thus, subject to increased, mandatory jail time, because of a previously filed but unproved charge.

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PETITION FOR WRIT OF CERTIORARI

COMES NOW the petitioner, Kathleen J. Greene, and respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington entered in this case on July 28, 2005.

OPINION AND ORDERS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 154 Wn. 2d 722, 116 P. 3d 1008 (2005). A copy of the slip opinion is found at Appendix A-1. The Supreme Court of Washington's order denying the petitioner's (respondent below) motion for reconsideration was entered September 9, 2005. A copy of that order is found at Appendix A-17. Supplemental findings of fact and conclusions of law showing the trial court's ruling that the statute in question violated the due process clause of U. S. Const. amend. XIV were entered on February 6, 2004. A copy of those findings and conclusions is found at Appendix A-14.

JURISDICTION

The petitioner seeks review of the judgment of the Supreme Court of the State of Washington that was entered on July 28, 2005. The petitioner's timely motion for reconsideration was denied by the Supreme Court of the State of Washington on September 9, 2005. This petition is filed within 90 days after September 9, 2005.

This Court's jurisdiction is based on 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, Section 1

... nor shall any State deprive any person of life,
liberty, or property, without due process of law;

Revised Code of Washington, RCW 46.61.5055(12)(a):

(12) For purposes of this section:

(a) A "prior offense" means any of the following:

...

- (v) A conviction for a violation of of RCW 46.61.5249 [first degree negligent driving], 46.61.500 [reckless driving], or 9A.36.050 [reckless endangerment] or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;

....

Revised Code of Washington, RCW 46.61.5249(1)(a):

A person is guilty of negligent driving in the first degree if he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property, and exhibits the effects of having consumed liquor or an illegal drug.



STATEMENT OF THE CASE

Unless and until this Court finally resolves an important, recurring question of due process, thousands of DUI (driving under the influence of intoxicating liquor or drug) defendants face increased jail time. A Washington statute deems them prior offenders on constitutionally questionable grounds. Under that statute, RCW 46.61.5055(12)(a)(v), a DUI defendant previously convicted of first degree negligent driving must be treated as a prior offender if the negligent driving conviction was entered in a case originally filed as a DUI charge. The mere charge of DUI promotes a first degree negligent driving conviction to the same level as a previously proven DUI conviction.

By statute, sentencing courts in Washington must impose an increased minimum jail sentence on certain persons convicted of DUI. RCW 46.61.5055(2)(a), (b). Those subjected to this greater mandatory minimum jail sentence are all those having a "prior offense." Those who are not prior offenders suffer a mandatory minimum of one or two days in jail (depending on whether a breath test was taken and on its results). RCW 46.61.5055(1)(a), (b). First offenders face a maximum of one year in jail. RCW 46.61.5055(1)(a), (b).

Defendants with one prior offense suffer a mandatory minimum of 30 or 45 days in jail (depending on whether a breath test was taken and on its results). RCW 46.61.5055(2)(a), (b). Those with one prior offense face a maximum of one year in jail plus 60 or 90 days of electronic home monitoring (depending on whether a breath test was taken and on its results). RCW 46.61.5055(2)(a), (b).

The federal constitutional question presented here arises from Washington's definition of "prior offense." A

"prior offense" is statutorily defined as a previous conviction of the following offenses (RCW 46.61.5055(12)(a)(i-iv)):

DUI (RCW 46.61.502);

Being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504);

Vehicular homicide (RCW 46.61.520);

Vehicular assault (RCW 46.61.522).

The statute in question also confers prior offender status on persons bearing a conviction of the less serious offense of negligent driving in the first degree, provided that the conviction resulted from a charge originating as a DUI, actual physical control, vehicular homicide or vehicular assault. RCW 46.61.5055(12)(a)(v).

Pursuant to the statute in question, RCW 46.61.5055(12)(a)(v), the defendant Kathleen J. Greene must be treated as a prior offender on sentencing for her only DUI conviction. Under the statutory mandate, Ms. Greene's status is identical to one who has an actual prior conviction of DUI, physical control, vehicular homicide or vehicular assault. Ms. Greene's status as a convict is occasioned not by proof, but by a prior first degree negligent driving conviction in a case originating with a DUI charge. Because of the unproven DUI charge, Ms. Greene is subjected to the same mandatory sentencing scheme as those bearing an authentic DUI conviction.

Had the statute in question been upheld by the trial court, the defendant Kathleen J. Greene would have been sentenced to 45 days in jail. Instead, Ms. Greene was treated as a first offender and was required to serve only two days in jail. Although the trial court had discretion to

require Ms. Greene to serve as much as one year in jail, she was treated less severely than the statute in question required. Had the trial court followed the statutory mandate to treat Ms. Greene's previous, unproven DUI charge as a conviction, she would have faced a jail sentence 22½ times longer than the trial court found to be fair and just. She would also have been vulnerable to a greater maximum penalty than a first offender.

At the trial court (Walla Walla County District Court), the petitioner challenged the statutory determination that she was a prior offender. The petitioner argued and the trial court concluded that punishing her as if she had been convicted of a previous DUI violated her right to due process guaranteed by the U. S. Constitution. (App. A-15) The trial court relied on an intermediate appellate court opinion, *State v. Shaffer*, 113 Wn. App. 812, 55 P. 3d 668 (2002), holding that a statute mandating a minimum sentence based on a prior offense arising from an unproven charge deprived the defendant of due process under the U. S. Constitution, Amendment XIV. The *Shaffer* court recognized as controlling certain due process principles that were stated in *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). *Shaffer*, 113 Wn. App. at 817.

The respondent City of Walla Walla sought direct review of the trial court's decision by the Washington Supreme Court. Among the reasons for direct review set forth by the trial court were (App. A-10, 11):

This case involves a fundamental and urgent issue of statewide importance requiring prompt and precedential determination ... because at issue is the constitutionality of RCW 46.61.5055(12)(a)(v) as applied to Washington's

driving under the influence (DUI) sentencing statute.

...

The recidivism rate in cases involving a DUI arrest is 30%. Therefore, over 11,000 future DUI cases involving defendants convicted of first degree negligent driving between 1998 and 2002, in addition to unenumerated cases from other periods, are potentially affected by the determination of whether or not RCW 46.61.5055(12)(a)(v) is constitutionally enforceable.

Just as the state's capacity to punish DUI defendants was diminished by the trial court's invalidating the sentencing statute, thousands of individuals unfairly face increased punishment until the federal constitutional issue presented here is determined by this Court.

The issue presented here was raised initially in the trial court. There, a ruling was made invalidating the statute in question because it was deficient under U. S. Const. amend. XIV. (App. A-15) The federal constitutional question on which the trial court's ruling turned was presented to the Washington Supreme Court. (App. A-1) That Court granted direct review and reversed the trial court. (App. A-6) The Washington Supreme Court concluded that the statute in question did not violate due process, and overruled *Shaffer, supra*, for its holding that *Winship, supra*, required a contrary result. The Washington Supreme Court was divided. Two dissenting justices opined that "Due process requires greater safeguards to protect individual liberty." (App. A-9)



REASONS FOR GRANTING THE PETITION

- I. **BY UPHOLDING A STATUTORY COMMAND THAT AN UNPROVEN CHARGE TRIGGERS AN INCREASED JAIL SENTENCE FOR THOUSANDS OF DUI FIRST OFFENDERS, THE SUPREME COURT OF WASHINGTON DECIDED AN IMPORTANT AND RECURRING QUESTION OF FEDERAL DUE PROCESS THAT SHOULD BE SETTLED BY THIS COURT.**

Only one question has been presented, litigated and decided in this case: Whether the Washington DUI sentencing statute violates the U. S. Const. amend. XIV, Section 1. The trial court ruled that the statute was constitutionally deficient because it deprived the defendant of due process. (App. A-15) The Washington Supreme Court divided on the same issue with the majority finding no constitutional deficiency. (App. A-5, 6) As stated by the dissenters (App. A-9):

A difference in punishment is predicated on an unproved charge. This result violates due process.

...

Due process requires greater safeguards to protect individual liberty.

This issue of federal due process can be definitively and finally determined only by this Court.

The issue presented here concerns thousands of DUI defendants who are at risk of greatly increased jail sentences unless the decision below is overturned. (App. A-11) Although the penalties involved here are not huge, they are significant: they involve mandatory jail time.